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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

v.

KARL W. GREEN,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 per cent of the rail industry's line haul mileage, produce 93 per cent of its freight revenues and employ 91 per cent of rail workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in the United States, Congress structured this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated, leaving the railroad industry virtually the only one where work-related injuries are compensated under a fault-based system.[1]

Each year thousands of claims and lawsuits are asserted under FELA against AAR members. In recent years, FELA costs have risen to over $1 billion a year, far more than is spent by private industry in general in payment of compensation to injured employees.[2]

This case has a direct and substantial impact on the amounts paid by railroads to compensate their injured employees. The ruling confirms a practice of double payment imposed on railroads; they must fully compensate an injured employee for lost wages and also serve as primary contributors to disability benefits from the Railroad Retirement System which compensates for the same loss.[3]

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[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] For the past four years, the major railroads have spent between $1.2 and 1.3 billion on FELA annually, or nearly 4 per cent of their gross revenues. ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (Calendar years 1991, 1992, 1993, 1994) ("CLAIM & LITIGATION REPORT"). Private industry other than railroads pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), whereas railroads pay over $2.00. 1994 CLAIM & LITIGATION REPORT, at 2-2.

[3] The Railroad Retirement System, another system unique to the railroad industry, provides retirement and other benefits to employees. 45 U.S.C. §§ 231-231u. The funding of Railroad Retirement

As a result, individual employees can reap a double recovery from the same source. AAR has a strong interest in seeking amelioration of this unwarranted and unfair financial burden on its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE LOWER COURT'S RULING WHICH PERMITS EMPLOYEES TO RECEIVE EMPLOYER-FUNDED DOUBLE BENEFITS FOR THE SAME LOSS

The ruling below decides a significant legal issue in FELA cases: the application of the collateral source rule to Railroad Retirement disability annuities, on the basis of dicta in a decision of this Court, *Eichel v. New York Central R. Co.*, 375 U.S. 253 (1963). Even though the issue has never been squarely presented to this Court, the court below, and other lower courts, have eschewed analysis and simply established and sustained a rule that visits an unfair and costly burden on the railroad industry.

A. The Railroad Retirement System Provides Substantial Benefits to Disabled Employees on Top of the Compensation Provided by FELA

Railroads and their workers are afforded unique treatment in many areas of industrial relations. They are governed by a federal tort law—the Federal Employers' Liability Act (FELA)—rather than the no-fault workers' compensation laws that cover the vast majority of other industries. Workers' compensation schemes cap employers' liability, but FELA does not.[4] While FELA is nomi-

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benefits comes primarily from a payroll tax levied on the rail industry. *See infra* note 15 and accompanying text.

[4] All workers' compensation laws cap weekly benefits available to employees. U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORK-

nally a negligence statute, its standard of causation has been reduced through judicial interpretation; as a result, the burden on plaintiffs to prove the elements of their claims is lower and the likelihood of recovery is higher.[5] Moreover, if a safety statute violation is the cause of an injury, the employee need not show negligence in order to recover.[6]

Unique treatment for the railroad industry also marks its retirement system. Railroads are not covered by the Social Security System, which extends to virtually all Americans. Instead, railroads workers are covered by the Railroad Retirement System. This system provides benefits to railroad retirees that are similar to Social Security benefits, as well as additional benefits that are above and beyond what Social Security beneficiaries receive.[7] Among the benefits provided under the Railroad Retirement System are disability annuities, available to employees who qualify on the basis of age and/or years of service.[8]

ERS' COMPENSATION LAWS 22-25, Chart VI (1994). Some impose additional limitations on benefits. Only punitive damages are excluded from FELA awards. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971); *Wildman v. Burlington Northern R. Co.*, 825 F.2d 1392, 1393-95 (9th Cir. 1987).

[5] *See, Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957); *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963); *Marchica v. Long Island R. Co.*, 31 F.3d 1197, 1207 (2nd Cir. 1994).

[6] If a safety statute is violated, it is considered negligence *per se*. *Urie* v. *Thompson*, 337 U.S. 163, 189 (1949); *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U.S. 384, 390 (1949).

[7] The two aspects of Railroad Retirement benefits are known as Tier I and Tier II. While Tier I is considered to be a Social Security equivalent, there are differences. For example, rail employees with 30 years of service may retire at age 60 at a reduced benefit, or at age 62 with no reduction. Social Security beneficiaries may not retire until age 62, and then, only at a reduced benefit. U.S. Railroad Retirement Board, 1994 Annual Report 74 (1994). ["RRB Annual Report"]

[8] 45 U.S.C. § 231a.

Depending on the nature of the disability suffered, rail employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits.[9] Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability, a special benefit not available to workers covered by Social Security.[10]

Importantly, a rail employee may qualify for a disability benefit regardless of whether the disability was the result of a work-related injury, also covered by FELA, or some other cause. Thus, while FELA and the Railroad Retirement System were designed at different times to serve different purposes, they can act to provide an employee with two sources of benefits for the same loss.

A significant number of rail employees receive disability benefits. In fiscal year 1993, 4,800 disability annuities were awarded to rail workers, of which 3,300 were for occupational disability.[11] The average monthly occupational disability awarded was $1,528; the average monthly total and permanent disability annuity awarded was $971.[12] As of September 30, 1993, disability annuities were being paid to about 78,000 former railroad workers.[13] Former rail employees received nearly $1 billion in disability benefits in 1993, the majority of which,

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[9] 45 U.S.C. § 231a(a)(1)(v). To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

[10] 45 U.S.C. § 231a(a)(1)(iv). To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

[11] RRB Annual Report at 21.

[12] *Id.*

[13] *Id.* at 22.

$846 million, was paid in occupational disability annuities.[14]

Occupational disability benefits, like all Railroad Retirement benefits that are over an above what are available to Social Security recipients, are financed by Tier II payroll taxes, which come primarily from railroad employers. The Tier II payroll tax is equal to 21 per cent of each employee's earnings (up to a threshold amount), of which 16.10 per cent is paid by the employer.[15] In fiscal year 1993, the employer share of Tier II taxes was about $1.695 billion; [16] in fiscal 1994, it was about $1.704 billion.[17]

B. The Decision Below Improperly Applies the Collateral Source Rule to Confer an Unwarranted Windfall on Employees and Impose a Burden on Employers

FELA plaintiffs can recover for lost compensation without a cap on recovery, a result that gives rail workers a preference over employees in other industries.[18] Often, the same individuals can also avail themselves of occupational disability annuities, another benefit unavailable to employees outside the rail industry. While the appropriateness of affording such differential treatment to one sector of the economy is a matter within the province of the Congress, it is for the courts to interpret FELA, including the applicability of legal doctrines like the collateral source rule.

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[14] *Id.*

[15] 26 U.S.C. § 3221(b). The remaining 4.9 per cent is paid by the employee. 26 U.S.C. § 3201(b).

[16] RRB Annual Report at 6.

[17] 1994 figure obtained directly from Railroad Retirement Board by AAR.

[18] Under workers' compensation, employees' wage loss benefits are capped. *See supra* note 4.

The purpose of the collateral source rule is to prevent a tortfeasor from gaining a windfall because the plaintiff is receiving compensation from an independent source.[19] The trial court recognized that this rationale did not apply in this case, where the railroad had funded the other source of compensation, stating that it would be "extremely unfair to require [the] employer to pay twice for the same injury in effect under the circumstances." (Pet. Brief at Appendix E, 20a). The Tenth Circuit itself recognized that, "[t]he collateral source rule generally does not apply 'when the collateral source is somehow identified with the tortfeasor.'" 59 F.3d 1029, 1032 (1995). Nonetheless, the Tenth Circuit reversed the trial court, holding that the collateral source rule precluded the railroad from showing that the plaintiff had received a Railroad Retirement disability annuity and that such payment should offset the FELA recovery. The unfairness of the Tenth Circuit's decision results in significant financial consequences to the nation's railroads.

The windfall is potentially in the hundreds of millions. AAR member railroads report that a substantial portion of employees who allege disabling work-related injuries and leave the industry in connection with a FELA settlement or judgment also are eligible for Railroad Retirement disability benefits.[20] As a result, substantial amounts of the money are paid under FELA to employees who are receiving an annuity partially to compensate for the same injury. Two major railroads have each paid between $45 and 70 million during each of the last five years to such

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[19] *Kassman v. American University*, 546 F.2d 1029, 1034 (D.C. Cir. 1976); *FDIC v. United Pacific Ins. Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994). 22 AM. JUR. 2d *Damages* § 566 (1988).

[20] *See* letters from AAR members Burlington Northern Railroad (Oct. 19, 1995), CSX Transportation (Oct. 11, 1995), Kansas City Southern Railway Company (Oct. 17, 1995) and Union Pacific Railroad (Oct. 18, 1995) to the Association of American Railroads, on file at the office of Amicus, 50 F Street, N.W., Washington, D.C. 20001.

employees; a third reports paying between $25 and 50 million annually during that period.[21] A number of small railroads report paying substantial amounts, as compared to the size of their operations, to such claimants; in some cases over $1 million a year.[22] While some of the FELA payout is to compensate for nonwage losses, much of it goes to compensate employees for the very wage loss covered by the disability annuities.

Review of this case will allow this Court carefully to consider the important policy issues raised, an analysis which heretofore has not been undertaken. It will allow both parties to address the question of whether the collateral source rule should be applied to deny a railroad the ability to introduce evidence that a FELA claimant is receiving, or will be eligible to receive, disability benefits that will partially compensate him or her for lost wages. To leave undisturbed the ruling below would permit rail employees to continue to receive both the full amount of disability benefits for which they qualify and to seek compensation for full wage loss under FELA, with the juries hearing their claims unaware of the double recovery. A matter which so fundamentally affects the rights of FELA litigants deserves careful review by this Court.

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[21] *See* letters from Burlington Northern Railroad, CSX Transportation and Union Pacific Railroad to the Association of American Railroads, *supra* note 20, on file at office of Amicus.

[22] *See* letters from Boston & Maine Corp., Maine Central Railroad Co. and Springfield Terminal Railway Co. (Oct. 13, 1995), also Chicago & Illinois Midland Railway Co. (Oct. 12, 1995), and Norfolk & Portsmouth Belt Line Railroad (Oct. 11, 1995) to Association of American Railroads, on file at office of Amicus.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Tenth Circuit in this case be granted.

Respectfully submitted,

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